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No. 97-296 and 97-464

In the Supreme Court of the United States

OCTOBER TERM, 1997

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY, PETITIONER

v.

CPC INTERNATIONAL, INC., ET AL.

CPC INTERNATIONAL, INC., CROSS-PETITIONER

v.

AEROJET-GENERAL CORPORATION, ET AL.

ON PETITION AND CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether a parent corporation can be held directly liable under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9607(a)(2), as an operator of its wholly-owned subsidiary's facility, based on the parent corporation's own actions in directing the operation of the facility at the time of disposal of hazardous substances (Question Presented in No. 97-296).

2. Whether, if the Court grants the petition for a writ of certiorari in No. 97-296, it should also review the Sixth Circuit's holding that Aerojet-General is not liable as an "operator" (Question Presented in No. 97-464).

TABLE OF CONTENTS

	Page
Statement	1
Argument	3
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Cordova Chemical Co. v. *MDNR*, 536 N.W.2d 860 (Mich. Ct. App. 1995), appeal denied, 554 N.W.2d 319 (Mich. 1996)	7-8
Ohio v. *EPA*, 997 F.2d 1520 (D.C. Cir. 1993)	5
United States v. *Charter Int'l Oil Co.*, 83 F.3d 510 (1st Cir. 1996)	10
United States v. *Cordova Chemical Co.*, 113 F.3d 572 (1997)	2
United States v. *CPC, Int'l, Inc.*, petition for cert. pending, No. 97-454 (filed Sept. 10, 1997)	2, 3, 8
United States v. *Hercules, Inc.*, 961 F.2d 796 (8th Cir. 1992)	10

Statutes, regulations and rule:

Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601 *et seq.*:	
§ 101(11), 42 U.S.C. 9601(11)	4
§ 104, 42 U.S.C. 9604	3, 4
§ 104(c), 42 U.S.C. 9604(c)	6
§ 104(c)(3), 42 U.S.C. 9604(c)(3)	4, 5
§ 104(c)(6), 42 U.S.C. 9604(c)(6)	5
§ 106, 42 U.S.C. 9606	3
§ 107, 42 U.S.C. 9607	4, 6
§ 107(a), 42 U.S.C. 9607(a)	2
§ 107(a)(2), 42 U.S.C. 9607(a)(2)	7, 8
§ 107(a)(3), 42 U.S.C. 9607(a)(3)	7
§ 113(f)(1), 42 U.S.C. 9613(f)(1)	8
§ 113(f)(2), 42 U.S.C. 9613(f)(2)	10
§ 122(d)(2)(B), 42 U.S.C. 9622(d)(2)(B)	10

Statutes, regulations and rule—Continued: Page

Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 104(i), 100 Stat. 1620 5
26 U.S.C. 9507 4
28 C.F.R. 50.7 10
40 C.F.R.:
Section 300.435(f) 5
Section 300.435(f)(3) 5, 6
Section 300.510 5
Sup. Ct. R. 12.6 9

Miscellaneous:

H.R. Rep. No. 253, 99th Cong., 1st Sess. (1985) 5, 10

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BRIEF FOR THE UNITED STATES

STATEMENT

The Michigan Department of Environmental Quality (MDEQ) seeks review of a decision of the United States Court of Appeals for the Sixth Circuit in

United States v. *Cordova Chemical Co.*, 113 F.3d 572 (1997) (en banc). See 97-296 Pet. App. 1a-42a. The decision holds, among other things, that two corporations, CPC International, Inc. (CPC), and Aerojet-General Corporation (Aerojet), are not liable to the United States and the MDEQ, under Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9607(a), for the governments' expenses in responding to releases of hazardous substances from a facility located near Muskegon, Michigan. The United States has also filed a petition for a writ of certiorari seeking review of that decision. *United States* v. *CPC, Int'l, Inc.*, petition for cert. pending, No. 97-454 (filed Sept. 10, 1997). The United States' petition sets forth the facts and procedural history of the case in the lower courts. See 97-454 Pet. 3-14.

The United States and the MDEQ have raised the same issue in their respective petitions for a writ of certiorari. Each urges that the court of appeals erred in ruling that a parent corporation that actively participates in, and exercises control over, a wholly-owned subsidiary's facility does not qualify as an "operator" of the facility. Compare 97-454 Pet. I, 15-21, with 97-296 Pet. i, 8-19. The petitions differ, however, in that the United States seeks relief against both CPC and Aerojet, while the MDEQ seeks relief only against CPC. Compare 97-454 Pet. II, 20-21, with 97-296 Pet. ii, 4. The MDEQ's decision to seek relief against only one of the companies has prompted CPC to file a conditional cross-petition urging that, if the Court grants the MDEQ's petition, it should review Aerojet's liability as well. See 97-464 Pet. i, 4-7.

ARGUMENT

The United States submits this brief to explain our understanding of the relationship between the United States' petition for a writ of certiorari, the MDEQ's petition for a writ of certiorari, and CPC's conditional cross-petition. As described below, the United States and the MDEQ each have important and complementary interests in the issue presented by their petitions, but, as a consequence of CERCLA's statutory provisions and the facts of this particular case, their interests are not entirely congruent. The United States and the MDEQ agree on the question of law at issue here. The United States suggests, however, as a matter of sound procedure, that the Court should hold the MDEQ's petition and CPC's conditional cross-petition pending the Court's disposition of the United States' petition in No. 97-454, which places before the Court all of the relevant parties and all of the relevant claims.

1. As noted in the United States' petition (97-454 Pet. 3-6), Congress enacted CERCLA to create a comprehensive federal program for addressing the national problem posed by decades of improper disposal of hazardous substances. CERCLA authorizes the United States to undertake direct response actions to protect the public from the release and threatened release of hazardous substances. See CERCLA § 104, 42 U.S.C. 9604. CERCLA also grants the United States authority to issue orders and to seek injunctive relief to compel persons to respond to releases, or threats of release of those substances. See CERCLA § 106, 42 U.S.C. 9606.

CERCLA provides a mechanism for financing government-initiated cleanups of hazardous waste

sites and recovering those costs from the responsible parties. Upon satisfying statutory conditions, the United States may use the "Hazardous Substance Superfund" as the initial source of funding for federal response actions. See CERCLA §§ 101(11), 104, 42 U.S.C. 9601(11), 9604; 26 U.S.C. 9507. The United States may then bring judicial actions against responsible parties under Section 107 of CERCLA to recover the government's response costs and replenish the Superfund. 42 U.S.C. 9607.

The individual States have a significant role in federally-financed cleanups. Of particular relevance here, Section 104(c)(3) of CERCLA requires each State to provide cost-sharing and other assurances before any Superfund-financed remedial action may take place. Section 104(c)(3) provides in relevant part:

> The President shall not provide any remedial actions pursuant to this section unless the State in which the release occurs first enters into a contract or cooperative agreement with the President providing assurances deemed adequate by the President that (A) the State will assure all future maintenance of the removal and remedial actions provided for the expected life of such actions as determined by the President * * * and (C) the State will pay or assure payment of (i) 10 per centum of the costs of the remedial action, including all future maintenance [or (ii) 50 percent or more in circumstances where the State operated the facility at which the release occurred].

42 U.S.C. 9604(c)(3). In other words, the State is responsible for (1) paying 10 percent of the costs of a Superfund-financed "remedial action" at a facility that has not been operated by the State, and (2) fully

funding the costs of "maintenance" of the remedial action under CERCLA. See 40 C.F.R. 300.435(f), 300.510; see also *Ohio* v. *EPA*, 997 F.2d 1520, 1543-1545 (D.C. Cir. 1993).

Section 104(c)(6) of CERCLA provides that, for purposes of subsection (c)(3) cost share and maintenance responsibilities, treatment measures necessary to restore ground or surface water quality shall be considered "remedial action," rather than "operation and maintenance," for a period of up to ten years after commencement of operations, or until the ground or surface water quality is restored to a level that ensures protection of human health and the environment.[1] 42 U.S.C. 9604(c)(6); see 40 C.F.R. 300.435(f)(3). Consequently, for groundwater treatment remedies (such as the one being implemented at the "Muskegon" site), the United States contributes 90 percent of the funding for the operation and maintenance of the groundwater treatment remedy, and the State contributes the remaining 10 percent of the funding, for up to ten years after the remedy becomes operational. Thereafter, the State pays the full maintenance costs for the groundwater treatment measure.

2. The United States has incurred the bulk of the response costs to date for cleaning up the hazardous conditions at the Muskegon site. Nevertheless, the MDEQ (which was formerly known as the Michigan Department of Natural Resources (MDNR)), has also

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[1] The Section 104(c)(6) provisions were added to CERCLA through the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, § 104(i), 100 Stat. 1620; see also H.R. Rep. No. 253, 99th Cong., 1st Sess., Pt. 1, at 60, 70 (1985); *Ohio* v. *EPA*, 997 F.2d at 1544.

incurred significant response costs at the site. See, *e.g.*, 97-296 Pet. App. 82a-83a (stipulation and order entered in April 1992 by the district court indicating that the MDNR had incurred $1.65 million in past response costs); see also 97-296 Pet. App. 80a. Both the United States and the MDEQ will also incur future response costs at the Muskegon site.

Most significantly, the MDEQ will be obligated to pay its statutory cost-share of implementing the groundwater treatment measure at the site. The EPA has not yet declared the groundwater treatment remedy "operational and functional." See 40 C.F.R. 300.435(f)(3). Once it does so, Section 104(c) of CERCLA will require the MDEQ to pay 10 percent of the operation costs for up to ten years and to pay the full costs of operation and maintenance in the ensuing years. 42 U.S.C. 9604(c). The EPA currently estimates that the long-term operation of that remedy will last approximately 30 years and, therefore, that the present value of the MDEQ's financial commitment at this site is likely to be substantial.

3. Section 107 of CERCLA provides that the United States, as well as a State, may recover response costs from the parties that Congress has deemed liable under the statute. See CERCLA § 107, 42 U.S.C. 9607. In the instant case, the United States filed a cost recovery action under Section 107 of CERCLA to recover its response costs at the Muskegon site against CPC, Aerojet, Aerojet's subsidiaries, Cordova Chemical Company (Cordova/California) and Cordova Chemical Company of Michigan (Cordova/Michigan), and Arnold Ott. See 97-296 Pet. 5. The MDEQ initially was drawn into this dispute because CPC and Aerojet filed contribution actions against the MDNR. The MDNR later filed a counter-

claim against CPC and a cross-claim against Aerojet and the Cordova subsidiaries for cost recovery and contribution. *Ibid.*[2]

The MDEQ also has an unusual financial interest in the instant cost-recovery action against CPC and Aerojet that arises from the pre-litigation history of the Muskegon site. In 1977, Aerojet's subsidiary, Cordova/California, purchased the site and also entered into an agreement with the MDNR under which Cordova/California agreed to undertake certain clean-up actions, the MDNR agreed to share in the funding of those actions, and the MDNR agreed to indemnify Cordova/California for other expenses. 97-296 Pet. App. 105a-112a. The Michigan state courts have held that because of that agreement, the MDNR must indemnify Aerojet and its Cordova subsidiaries against any CERCLA liability that they may incur at the Muskegon site. See *Cordova Chemical Co.* v.

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[2] CPC actually initiated the legal actions by filing contribution actions in anticipation of the United States' suit. See 97-296 Pet. 4-5. CPC sued not only the MDNR, but also Aerojet, the Cordova subsidiaries and ultimately CPC's insurer, while Aerojet and the Cordova subsidiaries filed claims against CPC. 97-296 Pet. 5. The district court, which consolidated the actions for resolution in three phases (liability, remedy, and insurance coverage, 97-296 Pet. App. 139a-140a), has not resolved any of the contribution claims brought by the companies against each other. *Ibid.*; see *id.* at 81a. The district court dismissed contribution claims brought by CPC and Aerojet against the MDNR under CERCLA, holding that the MDNR was not liable as an operator under Section 107(a)(2) or as an arranger for disposal of hazardous waste under Section 107(a)(3). See 97-296 Pet. App. 127a-131a, 138a. The court of appeals affirmed the district court's decision regarding arranger liability, the only claim against the MDNR that was appealed. See *id.* at 13a-14a.

MDNR, 536 N.W.2d 860 (Mich. Ct. App. 1995), appeal denied, 554 N.W.2d 319 (Mich. 1996) (Table).

The MDEQ's petition indicates that the MDEQ does not seek relief against Aerojet, but seeks review of only that portion of the court of appeals' judgment pertaining to the liability of CPC as an operator of the Muskegon site under Section 107(a)(2) of CERCLA. See 97-296 Pet. ii, 4. As CPC's conditional cross-petition suggests, the MDEQ appears to have limited its requested relief in that way to avoid subjecting itself to potential liability as Aerojet's indemnitor. See 97-464 Pet. 5 & n.4. The United States, by contrast, has sought relief against both CPC and Aerojet because, in the United States' view, they are both directly liable as "operators" under CERCLA.[3] See 97-454 Pet. 20-21.

4. As the foregoing discussion indicates, the United States has the predominant interest in the outcome of this case under the CERCLA framework, but the MDEQ also has substantial interests under CERCLA. The MDEQ's position in this case appears to be affected, however, by its potential financial obligations under an indemnity agreement with one of the respondents, which has prompted CPC to file its conditional cross-petition. The United States sub-

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[3] This does not mean, of course, that they ultimately would be subject to the same monetary assessment for the conditions at the Muskegon site. Under CERCLA's statutory contribution provisions, if CPC and Aerojet are found to be jointly and severally liable, they would be entitled as a matter of contribution to obtain an equitable allocation of their respective shares of the response costs. See CERCLA § 113(f)(1), 42 U.S.C. 9613(f)(1) ("In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.").

mits that, if (as we urge) the Court decides to grant review in this case, it can most effectively accommodate the various interests of the parties by holding the MDEQ's petition and CPC's cross-petition until the Court resolves the issue set out in the United States' petition for writ of certiorari. That procedure would place all of the relevant parties and claims before the Court.

The United States' petition and the MDEQ's petition present an identical legal question for the Court's review. They differ only in that the United States seeks reversal of the court of appeals' judgment with respect to both CPC and Aerojet, while the MDEQ seeks reversal solely with respect to CPC. Hence, the MDEQ could pursue its specific claim against CPC as a respondent supporting the United States' position under Rule 12.6 of the Rules of this Court, while the MDEQ's own petition remains pending for appropriate relief should that position prevail. At the same time, the United States' request for relief against both CPC and Aerojet would also satisfy CPC's concern that the Court also consider the potential liability of Aerojet. Because the United States' petition effectively places all of the relevant parties and issues before the Court, there is no need to follow the procedurally cumbersome course of granting two petitions and a conditional cross-petition to achieve the same result.[4]

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[4] In light of CPC's concerns about its liability vis-à-vis Aerojet, we note that the United States had settlement discussions with the MDEQ and Aerojet before filing its petition in this case, and those discussions are likely to continue. The United States is, of course, receptive to resolving the liability of potentially responsible parties through settlement on reasonable terms and in accordance with the provisions of

CERCLA. Under CERCLA's provisions, such settlements affect the rights of other parties to contribution from the settling parties. See CERCLA § 113(f)(2), 42 U.S.C. 9613(f)(2). In the event that the United States, the MDEQ, and Aerojet should ultimately reach agreement respecting Aerojet's liability, the proposed settlement agreement would be formalized in a proposed consent decree that would be subject to public notice and comment before receiving final approval. See CERCLA § 122(d)(2)(B), 42 U.S.C. 9622(d)(2)(B); 28 C.F.R. 50.7.

Under the United States' standard practice in CERCLA cases, a proposed consent decree is lodged in the district court in which the action is pending, and the United States publishes a notice of the proposed consent decree in the Federal Register. Persons who are not parties to the proposed consent decree are given at least 30 days before its entry as a final judgment to provide comments. The United States considers, and files with the court, all such comments, and the United States may withhold its consent to the proposed decree if the comments "disclose facts or considerations which indicate that the proposed judgment is inappropriate, improper, or inadequate." CERCLA § 122(d)(2)(B), 42 U.S.C. 9622(d)(2)(B); see 28 C.F.R. 50.7. Furthermore, in approving a consent decree, a district court must determine that the settlement is reasonable, fair, and consistent with the purposes that CERCLA is intended to serve. See, *e.g.*, *United States* v. *Charter Int'l Oil Co.*, 83 F.3d 510, 515 (1st Cir. 1996); *United States* v. *Hercules, Inc.*, 961 F.2d 796, 800 (8th Cir. 1992); see also H.R. Rep. No. 253, 99th Cong., 1st Sess., Pt. 3, at 19 (1985).

Hence, in the event that settlement discussions resume while this case is pending before the Court and an agreement is reached, CPC would have a full opportunity to comment on the proposed terms and raise objections before the agreement is entered as a final consent decree.

CONCLUSION

The petition for a writ of certiorari in No. 97-296 and the conditional cross-petition in No. 97-464 should be held and disposed of in accordance with this Court's disposition of the United States' petition for a writ of certiorari in No. 97-454.

Respectfully submitted.

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NOVEMBER 1997